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92-1822

No. .....

Supreme Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

Myron Curtis Gackenbach, Esq.
Petitioner

vs.

Dexter Hysol Corporation
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Myron Curtis Gackenbach, Esq.
3078 Glendon Road
Bethlehem, PA 18017
(215) 691-1179

QUESTIONS PRESENTED

1. The issue raised, that if the arbitrary requirement that corporate merger intermediaries/ finders must be licensed real estate brokers, so egregious and totally incorrect that pursuant to Rule 10 of the Rules of the Supreme Court of the United States this Honorable Court should grant the Writ of Certiorari, Particularly when the petitioner is a duly licensed attorney at law.

2. Was the Action of the Court below in granting the motion of summary judgement based upon the facts in this case so unconscionable, totally incorrect, and egregious so as to be a violation of petitioners Constitutional, Civil and professional rights, and therefore unconstitutional?

3. Was the petitioner, Myron C. Gackenbach, Esq., deprived of his constitutional right to a full and fair trial by a fair and impartial tribunal, particularly where no other issue was disputed?

4. Should a District Magistrate arbitrarily and capriciously and without a hearing of any kind prevent Petitioner Gackenbach from a jury trial on the facts?

PARTIES

The parties to this action are Myron Curtis Gackenbach, Esq., an individual, and Dexter Hysol Corporation, a corporation, the parties listed in the caption.

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No. .....

IN THE SUPREME COURT
OF THE
UNITED STATES

Myron Curtis Gackenbach, Esq.
Petitioner,
vs.
Dexter Hysol Corporation
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petition, Myron C. Gackenbach, Esq., respectfully prays that a writ of certorari issue to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Order of the Third Circuit affirming the Summary Judgement of the District Court is attached hereto as Appendix "A". The District Court's Opinion appears as Appendix "B".

JURISDICTION

Jurisdiction was based on diversity of citizenship after consideration by a panel. This Petition is filed within the 90 days allowed by 28 U.S.C. Section 2101.

STATEMENT OF THE CASE

The Petitioner, Myron Curtis Gackenbach, Esq., is an attorney duly licensed to practice law in the Commomwealth of Pennsylvania. Not only is the Petitioner an attorney, he is a leading national authority on corporate acquisitions. He is an expert on corporate mergers and acquisitions and an author and writer of articles on corporate acquisitions. An example of his expertise in the field appears in Channel Magazine, a publication of the International Semi-Conductor Association. A copy of which article is attatched to the Statement of the Case as Apendix "C". As indicated in the article, Mr. Gackenbach conducts his corporate acquisition/finding and consulting business under the name of Chemical Markets and Investment Company. The principal activity of Petitioner's company is identifying potential businesses for

corporate acquisition. This particular activity is one which requires a great deal of expertise, experience and a sophisticated knowledge of the needs of a particular corporation for acquisition.

In the mid-1980's, Mr Gackenbach entered into a contractual relationship with the Defendant through its duly authorized employee, Stephen S. Dequer. Pursuant to the terms of this contractual relationship, the Corporation would pay Mr. Gackenbach a finder's fee calculated at three-forths of the Lehman Formula if Mr. Gackenbach introduced an acquisition candidate to the Defendant which was subsequently acquired.

Pursuant to the finder's agreement, in November of 1986, the finder introduced the Inland Specialty Chemical Company to the defendant as being a prime candidate for acquisition by the defendant. Appellant Gackenbach had merged Inland Specialty Chemical Company into Great Lakes Chemical Company prior thereto and therefore was in a position to know of the availability for acquisition. Subsequently Dexter Hysol acquired Inland Specialty Chemical Company and a finder's fee is therefore due and owing to appellant Myron C. Gackenbach.

REASONS FOR GRANTING THE WRIT

I.

This Petition involves a question of exceptional importance for the reasons as more fully set forth in the Petition.

The reasons which will be set forth in the Petition involve a serious and permanent impact which this Summary Judgement, if permitted to stand, will have on corporate acquisitions and mergers by its restrictions on the activities of investment bankers, brokers and professional merger and acquisition finders and is totally indifferent to the current practice of each activity.

If this order is allowed to stand, such major corporate acquisition and merger firms as Goldman-Sacks, Morgan Stanley, Solomon, Lehmen and Merill Lynch would have to stop their respective merger and acquisition activities and each apply for a real estate license which none now have. A copy of the Order for which the rehearing is sought is attatched hereto as Exhibit "A".

The opinion of the Ditrict Court which was approved without opinion by the Appellate Court, did not consider these totally relevant facts which lead to the inevitable conclusion that Motion for Summary Judgement was erroneously and totally incorrectly entered by the District Court. Espe-

cially egregious in this case is the fact that Appellant Gackenbach never has had a hearing of any kind in this matter from the filing of the complaint through discovery and to the entry of the summary judgement; in fact, he has never seen a judge even in a status call in this matter all in clear violation of the due process clause of the U.S. Constitution.

Those facts which the Court should consider in considering this Petition for Rehearing are set forth in the folllowing paragraphs.

a. The germ intelligence of Inland's availability for acquisition and attractive earnings record and the fact that it was an excellent fit with Dexter Hysol and at the same time available for acquisition from Great Lakes Chemical Company was Appellant Gackenbach's consideration, which Gackenbach tendered to support this Agreement with Dexter Hysol.

b. Dexter Hysol would not have acquired Inland Specialty Chamical Company without the services of Appellant Gackeenbach. Clearly the professional activities and services of Appellant Gackenbach were the effective procuring cause of Dexter Hysol's acquisition of Inland Specialty Chemical Company from Great Lakes Chemical Company.

c. Appellant, Gackenbach's services were

those of a corporate acquisition finder/intermediary and as such he was a provider of critical corporate intelligence, information, intellectual property, namely that Great Lakes Chamical Company had made a decision to sell Inland Specialty Chemical Company.

d. Dexter agreed to pay Gackenbach a finder's fee for the timely, exclusive and advantageous information to Dexter Hysol, if Dexter Hysol acquired Inland Specialty Chemical Company.

e. Gackenbach's consideration was the timely, exclusive, and critical information to Dexter plus his forebearance in not communicating this valuable information to other chemical companies.

Gackenbach was the intermediary in the former acquisition of Inland Specialty Chemical Company to Great Lakes Chemical Company, therefore he was in an enhanced position to know at the earliest possible date that Great Lakes, in turn, was willing to sell Inland Specialty Chemical Company.

The argument of Defendant that Appellant Gackenbach was acting as a realtor is totally frivolous and without a basis in fact. Gackenbach provided information in a timely critical way so that Dexter had a premier opportunity to acquire Inland Specialty. For this he earned his fee.

Gackenbach is a professional chemical industry corporate acquisition intermediary. He has assisted many corporations in finding attractive companies to acquire and was duly paid for his corporate intellegence service as a finder intermediary. He is also an attorney and a member of the Pennsylvania State Bar. Dexter Hysol/Appelle had knowledge of this fact from the beginning of their relations with Appellant Gackenbach.

Professional organizations that Gackenbach is a member of long standing include the New York Society of Security Analysts, and the Association of Corporate Growth, each of the members in these organizations are active as corporate acquisition/finder intermediaries and none have real estate licences. Gackenbach was also associated with the distinguished Wall Street investment firm of Bear Sterns & Company in the 1960's, please see attached article.

Mr. Gachenback/appellant is a nationally recognized authority on mergers and acquisitions in the high technnology Chemical, Semiconductor and pharmaceutical industries. (Attatched is a copy of an artricle Gackenbach, as a professional corporate intermediary/finder wrote for the Association of Semiconductor materials producers an international organization.)

Dexter's Dequer clearly indicated in his deposition that he would pay Gackenbach if Dexter acquired the "Black Hole" operations from the Olin Corporation. This is of extreme importance in that Gackenbach had no written agreement, but an oral finder agreement on this company; yet he would be paid as stated by Mr. Dequer, an executive of Dexter Hysol.

Dexter did pay other finder intermediaries finders fees for corporate acquisitions, none of whom had real estate licenses. Gackenbach had other finders fee agreements with Dexter Hysol at the time and prior to the acquisition of Inland Specialty Chemical by Dexter Hysol. Gackenbach was to be paid by his agreement with Dexter for intelligence that Great Lakes was willing to sell Inland Specialty Chemical Company - a real estate license has nothing to do with this. The Real Estate license arguement is irrelevant, spurious and ludicrous and has no merit or basis in fact.

Anyone familiar with the activities and practice of investment bankers and brokers in performing corporate mergers and acquisitions will realize that virtually none of the major firms such as Goldman-Sacks, Morgan Stanley, Solomon, Lehman, Merrill Lynch, First Boston, etc. have real eatate licences as a requirement for their respective ser-

vices as finders and merger and acquisition intermediaries and yet all of these major firms perform mergers and acquisitions of corporations every day of the week as finders and operatives without a real estate licence.

If the conclusion of the District Court as affirmed by the Appellate Court in this instance were the rule then all corporate merger and acquisition activity would have to shut down because none have real estate licenses. The fact that corporations have real estate holdings as incidental to corporate activities is of no consequence and irrelevant both in the present case and in any corporate merger acquisition.

Apellee Dexter Hysol did not in fact establish in discovery that Inland Specialty Chemical Company owned any real estate.

Clearly, in Pennsylvania, a finder's fee agreement need not be in writing - Amofina vs. U.S. Industries, 232 PA Sup 394 (1974).

The finder/intermediary is paid, i.e. receives consideration for the critical, timely and exclusive intelligence he has provided, that is the disclosure of the fact that an attrative corporate entity is available for acquisition, i.e. in this case the piece of intelligence that Inland Specialty Chemical Company was available from its then owner, Great

Lakes Chemical Company.

The fact that Great Lakes Chemical Company was willing to explore the sale of Inland Specialty Chemical Company was the critical and timely piece of corporate intelligence that Appellant, Gackenbach provided to Dexter Hysol exclusively since he knew it fit well with Dexter's operations. For these services, Appellant, Gackenbach should be paid per the oral agreement.

The fact that Appellant, Gackenbach was the finder/intermediary in the earlier acquisition of Inland Specialty Chemical Company to Great Lakes Chemical Company provided him an enhanced position in knowing (intelligence) the critical point in time that Great Lakes was willing to sell Inland Specialty Chemical Company so that Dexter Hysol could be the <u>first</u> to negotiate Inland's acquisition before any other chamical company could acquire Inland.

The arguement that Appellant, Gackenbach should be paid in this Inland/Dexter Hysol matter is further enhanced by the fact that Appellant, Gackenbach had several other finders fee agreements with Dexter Hysol before and during the Inland Specialty Chemical Company acquisition.

The narrow reasoning which has been used to defend Gackenbach's valid claim will lead to

chaos in the corporate merger and acquisition field if every finder neads a real estate licence.

The sale contemplated was not a sale of real estate but the sale of a valid ongoing business entity and as such the Real Estate Broker's Licensing Act does not apply and is totally irrelevant.

For all the reasons previously stated, even if the Act did apply, Gackenbach was clearly exempted because of his status as a licensed attorney at law.

In this matter, the acquired company, Inland Specialty Chemical Company, is a California and Indiana based company while the buying company, Dexter Hysol is a Connecticut and California based company, none is based in Pennsylvania.

The law is abundantly clear that an attorney at law is exempt from the Real Estate Licensing Act (Appeal of J.A. Young & Co., 160 A 151 (1932).

Large corporations should not be permitted to escape clear liability by utilizing a spurious defense such as the one offered by the defendant in this case.

Law, justice and equity clearly indicate that the valid claim of Gackenbach should entitle him to the orally agreed upon finders fee.

Especially egregious in this case is the fact

that Appellant Gackenbach never has had a hearing in this matter from the filing of the complaint through discovery and to the entry of the summary judgement; in fact, he has never seen a judge in this matter at all in clear violation of the due process clause of the U.S. Constitution.

This matter should be remanded for a full trial on the facts, clearly Appellant Gackenbach deserves a trial by having a jury determine these facts.

REASONS FOR GRANTING THE WRIT

II.

The Right To A Trial Is Guaranteed By The Constitution.

Any attempt to abrogate an individual's rights to his trial by jury is strictly proscribed by the Constitution. The motion for summary judgement which was granted by the court in this factual scenario clearly is in violation of the Constitution which guarantees the right of a trial by jury and therefore Gackenbach should have a jury trial on the facts instead of being Summarily shutout. There are questions of fact which a jury has a right to determine.

Gackenbach/petitioner was clearly the effec-

tive procuring cause as corporate acquisition/intermediary in Dexter acquiring Inland and therefore should be paid his fee from Dexter Hysol.

Real Estate licenses are clearly irrelevant in this kind of professional activity of corporate acquisition finder/intermediary.

Dexter would not have acquired Inland Specialty Chemical Company without petitioner Gackenbach's assistance and services. For the reasons stated, the Constitutional rights of the Petitioner were abrogated in violation of the U.S. Constitution.

The Petitioner was unilaterally deprived of his constitutional rights in that he did not enjoy the protection of the due process clause as mandated by the United States Constitution. The due process clause requires a full and fair trial before a fair or impartial tribunal.

The facts in this case clearly reveal that the full and fair trial mandated by the United States Constitution by a fair and impartial tribunal was not afforded to the Petitioner Gackenbach.

In support of this position, this Court is respectfully directed to the following cases: The West Penn Power Company vs. Train, (1975) 522 Fed. 2nd 302 Certiorari denied 96 U.S. Supreme Ct., 3165 and Comm. Human Relations Commis-

sion vs. Thorp, Reed & Armstrong, 361 A. 2nd 497, 25 PA Comm. 295 (1976). The substance of these cases are on the same issues as Petitioner Gackenbach in his action against Dexter and explicitly support this position.

III.

The Decision Of The Court In Depriving The Petitioner Of His Fee Is So Unconscionable That It Is Unconstitutional.

A review of the facts in this case clearly reveal that there was an improper granting of a Motion for Summary Judgement. This grant not only violated the due process clause of the United States Constitution but was blatantly unconscionable. (It is unconscionable that the Petitioner should be deprived of his broker's fee given the facts of this case.)

It is necessary to review the underlying facts of this case and apply constitutional principles to those facts. Several unrefuted facts should be considered by this court.

A. The Petitioner was never afforded the right to see a judge during this discovery period, not even for a status call.

B. Dexter would not have acquired Inland

but for the services provided by Mr. Gackenbach. He was the critical element in this acquisition by his initial disclosure and support services thereafter.

It is clear that the constitutional rights of the Petitioner were violated by not giving him his day in court. Justice and equity in the law requires nothing less than a remand of this case for the purpose of a full and fair trial on the facts.

The basic unfairness and unconscionbility of the results reached by the court on this case should lead without question to a remand by this court for a trial.

Please note Petitioner's article as a professional expert on corporate mergers and acquisitions which he completed for the International Semiconductor Producer's Association. In this excellent article are indicated the professional credentials of Petitioner Gackenbach stating his association in past years with distinguished Wall Street investment banking firms where he worked as an industry specialist and his membership in the professional merger and acquisition industry associations including the New York Society Security Analysts, the Association for Corporate Growth and numerous chemical industry associations.

For all the reasons stated, in particular the devestating economic consequenses which will be

inflicted upon the investment community by virtue of this totally incorrect decision, it is respectfully submitted that the decision of the court below should be remanded and its appellent Gackenbach be given the right to have this matter tried by a jury.

Please note Petitioner's article as a professional expert on corporate mergers and acquisitions which he completed for the International Semiconductor Producer's Association. In this excellent article are indicated the professional credentials of Petitioner Gackenbach stating his association in past years with distinguished Wall Street investment banking firms where he worked as an industry specialist and his membership in the professional merger and acquisition industry associations including the New York Society Security Analysts, the Associations for Corporate Growth and numerous chemical industry associations.

CONCLUSION

Petitioner Gackenbach should be granted his writ of certiorari on this narrow extraneous issue since there is no basis in law or in investment industry or corporate acquisition practices or any business practices for this totally outrageous, ignorant and irrelevant summary judgement decision by the lower court in denying petitioner

Gackenbach any hearing what so ever or even a meeting with a judge or magistrate and his denial of a trial on the facts.

The lower court does not understand that a corporate acquisition/finder is paid for his corporate intelligence service namely that a company is available for acquisition to a prospective buyer not for supplying and supervising the signing of a written sales contract for the sale of real estate as does a realtor.

This is the important distinction.

Accordingly petitioner Gackenbach was not functioning as a realtor, but as a supplier of critical corporate information to Dexter, namely, that Inland Specialty Chemical Co. was for sale, pursuant to his contract with Dexter. Therefore Dexter, the acquiring company was unjustly enriched by acquiring Inland, without paying Gackenbach, on petitioner Gackenbach's valuable information.

Petitioner Gackenbach clearly and certainly deserves a trial on these facts.

Respectfully Submitted

Myron C. Gackenbach, Esq.

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

MYRON CURTIS GACKENBACH	:	CIVIL ACTION
	:	
v.	:	
	:	
DEXTER HYSOL CORPORATION	:	NO.90-7235

MEMORANDUM

POLLAK, J. JUNE 26, 1992

Plaintiff has filed this breach of contract action to recover a finder's fee allegedly owed to him by defendant, Dexter Electronic Materials Division ("Dexter").[1] Plaintiff claims that he had an oral finder's-fee contract with defendant to identify potential target companies for defendant's acquisition. He asserts that the fee is owed, in accordance with the contract, as a result of his oral identification to defendant of Inland Specialty Chemical Corporation ("Inland"). Dexter's parent company, The Dexter Corporation, acquired Inland's business and assets in 1990.

1. Dexter is referred to in the caption and complaint as "Dexter Hysol Corporation."

Presently before the court is defendant's motion for summary judgement. Because I find that no genuine issues of material fact exist regarding plaintiff's entitlement to the disputed fee, I will grant defendant's motion.

ENTERED: 6/30/92
CLERK OF COURT

A.

Dexter moves for summary judgement on two grounds. First, defendant asserts that plaintiff did not possess a real estate broker's licence at the time that he allegedly fulfilled his oral contract with defendant, and thus, under Pennsylvania law, he is barred from recovering a fee for any assistance he may have provided defendendant in the course of its acquisition of Inland. Second, defendant argues that the evidence conclusively establishes that no contract existed between plaintiff and defendant pursuant to which defendant was to pay plaintiff a finder's fee: but that even if a contract did exist, defendant was already aware of Inland's acquisition potential at the time that plaintiff claims he provided defendant with information regarding Inland. As a result, any information defendant may have received from plaintiff concering Inland was not the "procuring cause" of defendant's acquisition of Inland.

Because I find that defendant is entitled to summary judgement on the first of these grounds, I will address only that issue.

B.

The Pennsylvania Real Estate Licensing Act, 63 P.S. § 455.302 (Supp. 1991) provides that:

> No action or suit shall be instituted, nor recovery be had, in any court of this Commonwealth by any person for compensation for any act done or service rendered, the doing or rendering of which is prohibited under the provisions of this act by a person other than a licenced broker, sales person, cemetery broker, cemetery salesperson, campground membership salesperson, time-share salesperson, builder-owner sales person or rental listing referral agent, unless such person was duly licensed and registered hereunder as broker or salesperson at the time of offering to perform any such act or service or procuring any promise or contract for the payment of compensation for any such contemplated act or service.

(emphasis added). Violation of this provision may subject the unlicensed recipient of a commision or fee to criminal penalties. 63 P.S. § 455.303. Plaintiff does not dispute defendant's contentions that (1) the statute is applicable to the disputed transaction betwen plaintiff and defendant and (2) he is not a licensed broker within the meaning of the Act. Instead, plaintiff argues that as an attorney-at-law, he is exempted from the Act's licensing requirement's by virtue of the exemption enumerated in § 455.304(4). Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgement ("Plaintiff's Brief") at 4. That section provides:

> Except as otherwise provided in this act, the provisions of this act shall not apply to the following:

> (4) The services rendereed by an attorney-in-fact under an executed and recorded power of attorney from the owner or lessor (provided such power of attorney is not utilized to circumvent the intent of this act) or by an attorney at law.

63 P.S. § 455.304(4).

Defendant challenges the applicability of this exemption to this case on the grounds that plaintiff has made no allegation that he provided legal services to Dexter, and that plaintiff was not retained as an attorney by Dexter at any time. Defendant's Reply Brief at 5.

The parties have not identified, nor has the court's research disclosed, cases construing the attorney exemption to the Licensing Act. However I am of the view that its drafters did not contemplate that an unlicensed broker whose attorney status is wholly irrelevant to the provision of services under a commision or finder's fee contract should nevertheless benefit from the exemption. Here plaintiff seeks to recover a finder's fee claiming that he (1) was "in the business of locating specialty . . . companies available for acquisition," Affidavit of Myron Curtis Gackenbach ¶ 3, attatched to Plaintiff's Brief; (2) was "a seasoned finder", Plaintiff's Brief at 6; and (3) "carried out the functions of a finder by introducing Inland to the Defendant as available for acquisition in early

1986," id. at 5-6. I conclude that plaintiff's allegations as to the scope of his activities as a "finder" for Dexter are insufficient for him to escape the Act's licensing requirements, notwithstanding his claim, made in response to this motion for summary judgement, that he is an attorney.[2]

This construction of the attorney exemption is consistent with the Act on its face. For example, subsection (4) expressly states that an attorney-in-fact may not use an executed and recorded power of attorney "to circumvent the intent of this act" 63 P.S. § 455.304(4). Logically, one would not suppose that Pennsylvania intended to sanction the provision by unlicensed persons — who happen to be attorneys — of non-legal services that unlicensed non-attorneys are barred from providing. "The law requires that it be 'liberally construed to effect [its] object.' 1 Pa.C.S. § 1928(c). A principal purpose of the Act is to protect buyers and sellers of real estate . . . from abuse by persons engaged in the business." Kalins v. Common

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2. I note that plaintiff's complaint might have been subject to dismissal because he did not plead facts -- either that he possessed a real estate license or that he fell within the attorney exemption -- establishing his capacity to bring this suit. Brown v. Kleinfelter, 406 A. 2d 560, 561 (Pa. Super. 1979); Burke v. Israel, 399 A. 2d 779, 783 (Pa. Super. 1979).

wealth, State Real Estate Commission, 500 A. 2d 200, 203 (Pa. Cmwlth. 1985). This purpose would be seriously undercut if an attorney, who is under no obligation to disclose that status to prospective clients and who may have no occasion to do so, were permitted by the courts to engage in activities regulated by the act — and which may be unrelated to the attorney's legal training -- completely beyond the control or the supervision that the statute intends to impose.

The construction of the attorney exemption that I am adopting is also consistent with the Act's legislative history. The predecessor of § 455.304, 63 P.S. § 432(c), which was repealed in 1980, provided:

> Neither of the said terms "real estate broker" or "real estate salesman" shall be held to include within the meaning of this act . . . any person holding in good faith a duly executed letter of attorney from the actual owner of any real estate, authorizing the sale, conveyance or leasing of such real estate for and in the name of such owner, or the negotiating of any loan thereon, where such letter of attorney is recorded in the office of the recorder of deeds, nor shall they be held to include, in any way, attorneys at law and justices of the peace . . . .

Early court decisions constuing the predecessor Act, which first took effect in 1929, determined that the Act was not rendered unconstitutional by virtue of

its exemption of attorneys and justices of the peace, see Appeal of J.A. Young & Co., 160 A. 151 (Pa. Super. 1932), on the view that as officers of the court, attorneys and justices of the peace were within the courts supervision at all times. Com. v. Klekner, 14 Leh. 163, 79 Pitts. 272 (1931). The exemption was seen as creating a right to engage in the leasing of real estate as an incident to legal practice. Kribbs v. Jackson, 129 A. 2d 490, 495 (Pa. 1957).

However, the 1980 repeal of the 1929 Act (63 P.S. § § 431-448) and its amendments, including § 432, and substitution of the present statutory scheme (63 P.S. § § 455.101-455.902) effected important changes in the Act's structure. Specific language was added defining conduct unlawful under the Act, see 63 P.S. § 455.301, and several of the Act's former exemptions were deleted, including those for justices of the peace and aldermen. See former § § 436.1, 436.2. This broadening of the scope of activities and persons regulated under the Act suggests the legislature's intent to limit the Act's exemptions only to those persons whose exemption-qualifying status is directly related to their real-estate activities. See, e.g., § 455.304 (specifying exemptions, among others, for owners of real estate, employees of

real-estate-purchasing utilities, officers of banking institutions owning or appraising real-estate, auctioneers, and religious or fraternal organizations owning or controlling cemeteries).[3] It follows, then, that a plaintiff seeking to recover under a finder's fee contract must make some demonstration that the activities performed in fullfillment of the contract related in some way to his status as an attorney before he may invoke the benefits of the Act's attorney exemption.[4]

---

3. On this point, defendant's arguement's are persuasive:

> It would flatly defeat the purposes of the Act if a person in plaintiff's position, who is acting solely as a finder or broker, was able to escape its requirements simply because of his unrelated status as an attorney. The provision relied on by plaintiff expressly prohibits such a result. It instead carves out an exclusion from the Act for attorneys who provide legal services for their clients in connection with a transaction involving real estate. 63 P.S. 455.304(4). If, for example, Dexter had retained plaintiff as its attorney to negotiate the terms of the asset purchase agreement whereby it acquired Inland, plaintiff would not have been subject to the provisions of the Act. However, the services plaintiff claims to have provided here are not services of this type.

Plaintiff's Reply at 6.

4. In so concluding, I recognize that courts of various jurisdictions are split in their interpretations of analogous provisions of the law in other states. Some

C.

Because plaintiff has not shown that his status as an attorney was in any way related to his alleged oral contract to perform services as a finder for Dexter,[5] I find that he does not fall within attorney exemption of the Pennsylvania Real Estate Licensing Act. Thus, I conclude that he is barred by § 455.302 of the Act from recovery in this suit. Accordingly, defendant's motion for summary judgement will be granted in the accompanying Order.

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holdings are in accordance with the view set forth in this Memorandum, while others have adopted a blanket exemption for attorneys under all circumstances. A summary of these decisions is set forth in "Right of Attorney, As Such, to Act or Become Licensed to Act as Real Estate Broker," 23 A.L.R. 4th 230.

5. Nor has plaintiff anywhere asserted that defendant as aware that he an attorney.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1605

MYRON CURTIS GACKENBACH,
Appellant,
vs.
DEXTER HYSOL CORPORATION,
Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 90-7235)
District Judge: Honorable Louis H. Poilak

SUBMITTED, JANUARY 25, 1993
BEFORE: GREENBERG, ROTH and LEWIS,
Circuit Judges.

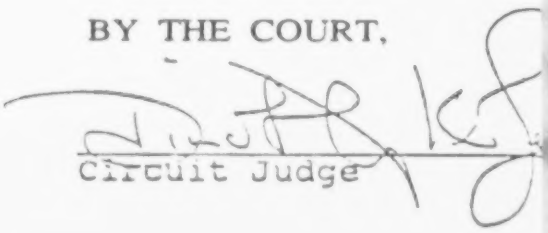
JUDGEMENT ORDER

After consideration of all contentions raised by the appellant, it is

ADJUDGED AND ORDERED that the judgement of the district court be and is hereby AFFIRMED.

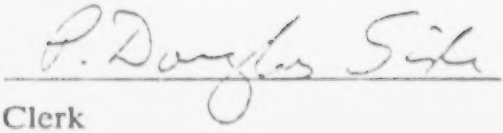
Costs taxed against the appellant.

BY THE COURT,



Circuit Judge

Attest:



Clerk

Date: January 26,1993

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Bethlehem and County of Notrthampton; I am over the age of eighteen years; my business address is: 3078 Glendon Road, Bethlehem, Pennsylvania, 18017.

On April 22, 1993, I served the within Petition for a Writ Certorari to the United States Court of Appeals for the Third Circuit in re: "Myron Curtis Gackenbach, Esq. vs. Dexter Hysol Corporation" in the United States Supreme Court, Term, 1993, No. . . . . ;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepared, in the United States post office mail box at Allentown, Pennsylvania, addressed as follows:

John D. Goetz, Esq.
Jones, Day, Reavis & Pogue
500 Grant Stret
Pittsburgh, Pennsylvania 15219

All parties required to be served have been served.

I certify under penalty of perjury, that the foregoing is true and correct.

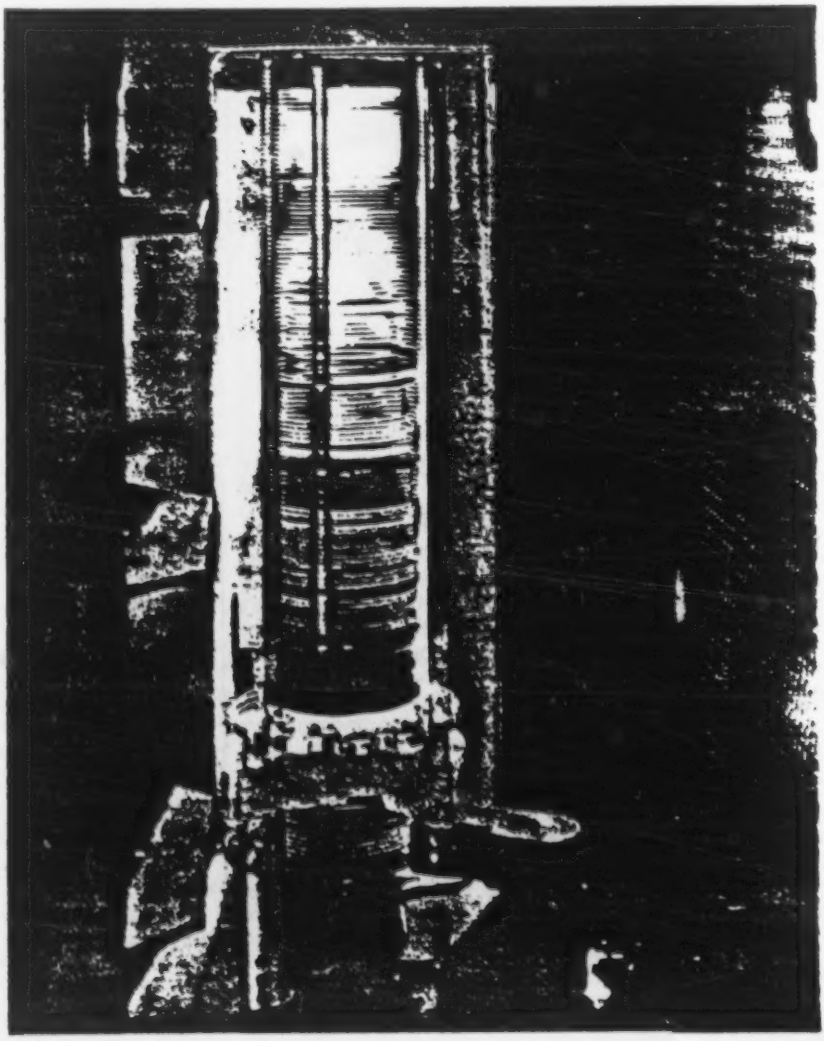
Executed on April 22, 1993, at Allentown, Pennsylvania

Myron C. Gackenbach, Esq.

Myron C. Gackenbach, Esq.

Channel Magazine

MICONDUCTOR EQUIPMENT AND MATERIALS INTERNATIONAL PUBLICATION



The Consortium Craze

Playing the Mergers and Acquisitions Game

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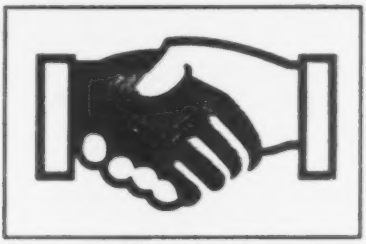

Tips from an industry veteran

By Myron C. Gackenbach

The development of "niche processes" has created a boom market for mergers and acquisitions in the semiconductor equipment and materials industry. In recent years Olin, Dupont, Union Carbide, Dexter Hysol, General Signal, Eaton and Morton Thiokol have been active in the hunt for such niche businesses.

More mergers and acquisitions loom ahead. Analysts predict opportunities in a broad range of companies that manufacture: packaging and testing equipment, sensors, specialty coatings and adhesives, mask-making materials, inspection systems, insulating materials, and wafer processing and fabrication equipment.

Why are companies in this industry targeted for acquisition? A look at the balance sheet often tells the tale. Under-capitalization—caused in part by a fragmented marketing strategy, competitive pressures and new product development costs—is the primary villain.

Although the cost of acquiring an equipment or materials company has jumped in recent months, it has yet to reach the stratospheric heights recorded in other industries, such as food and pharmaceuticals.

Determining a fair cost for an equipment/materials company has its own peculianues. The business world's most common measures, such as sales to asset ratios or book values per share, are overshadowed by a number of technical issues. A "fair price" in this industry is often determined by patent positions, incremental sales and earnings growth and perceived market acceptance.

One statistical measure that is scrutinized, however, is price times earnings ratios. When evaluating a target company, suitors should look for P/E multiples of approximately 15 times

When hiring a middle man the track record is more important than the name

earnings. There should ideally b consecutive years of increment earnings growth of 10 perce better and a current asset-to-li ratio of not less than two to o

If the acquisition cost exce times earnings in cash or stock ers often turn away. Other fin figures worth noting are: erodin margins—which often stem strong competitive pressures—a cost of developing new techno

Success or failure in acqui or merger often depends o company that handles the sear negotiations. When hiring tha an impressive track record is important than an impressive Big-name investment bankers are often retained to handle and negotiations, may have superficial knowledge of the ment and materials industry. might lack the subtle underst of how a prospective acquisitio plements the operations of a

Most investment bankers, i are told by their clients which c nies to contact and explore fo sible acquisitions. For these services they often charge heft

tting fees. If not an investment nker, what sources are available r searching out possible acquisi-ns? As a first step, utilize the exper-e that's close at hand. Middle nagers in most high technology ms have a keen understanding of ir company's dynamics. With that ight, they can objectively analyze e strengths and weaknesses of ospective acquisitions. These "in-use" corporate development advi-s are a valuable resource and should consulted in every acquisition dertaking.

Another possibility is to use inde-ndent, highly specialized interme-ary organizations that have a strong ck record in the equipment and terials industry. The role of these ms can be compared to independ-geologists that serve the oil indus-. Using their in-depth knowledge the equipment/materials terrain, y have the insight to seek out mpanies with complementary tech-logy and corporate cultures.

This industry expertise can pay mediate dividends. Most owner/ nagers of target businesses would her be contacted initially by some-e who shows an understanding of ir industry. Never underestimate value of that first contact.

ontrolling Fees

After initial contact with a target mpany is made, the question of s often becomes paramount. rough hard negotiating, fees paid investment bankers, lawyers, ac-untants and public relations spe-lists could often be slashed. Some perts believe most fees could be up to 80 percent and still generate efty profit.

The industry is rife with examples shoddy fee management. One mpany recently paid more than million to an investment banking to handle a large acquisition. s amount did not include legal or accounting fees, printing costs or in-house support services. Out of pocket expenses, presumably pencils, paper, etc., were all extra.

In another case two firms received $15 million each for authoring four-page opinion letters on the value of a proposed merger. Virtually any senior security analyst could have performed this same service for a small fraction of that amount. In addition to those fees, management should monitor closely the costs for the legal and accounting services. For the most part, they are simply clerical functions. Little originality or creative thought is required to prepare financial or registration statements or to file appropriate documents with government agencies.

The industry is rife with examples of shoddy fee management

Fees charged by smaller, intermediary organizations and consultants, unlike investment bankers, are typically much lower, seldom exceeding 3 percent for transactions less than $10 million. That figure can drop to 2 percent for transactions of $10-50 million. For deals over $50 million, 1 percent is often the standard fee, in addition to out-of-pocket expenses.

Responsibility for negotiating an equitable fee is only one burden faced by top management in a possible merger or acquisition. At the target company of a hostile takeover, management often exhibits difficulty seeing past its own self-interests. In reality, corporate officers are merely "hired hands" who have a fiduciary duty to serve the collective best interests of their stockholders and employees. In fact, most senior officers of major corporations have only token equity interests in their respective companies. They experience little personal loss when they dissipate corporate assets through golden parachutes, takeover defenses or, in acquiring companies, acquisition fees.

It's an unfortunate yet undeniable fact that when a hostile takeover bid is received, management's first reaction is often to develop a strategy to save itself. Examples of this myopic behavior abound. Under the guise of defending corporate independence, executives have saddled their firms with enormous debt while fending off hostile takeovers. In reality, management's duty is to determine the value of the bid as it could benefit the organization as a whole. Their self-interests should not be an issue.

When the Boom Ends

The current boom in mergers, acquisitions and leveraged buyouts should continue as long as high inventories in the computer industry keep pressure on profit margins and sales prospects. Those trends may begin to abate late this spring. Until then, the consolidation of the industry through acquisitions and mergers will spell survival for many undercapitalized firms.

For acquiring companies, the current business environment is an opportunity to buy at bargain prices smaller, creative companies with proprietary product lines.

About the Author

Myron Gackenbach is president of Chemical Markets and Investments Company, an acquisition consulting firm. A former analyst for several investment banking firms, including Bear Stearns and Company, Mr. Gackenbach is a member of the New York Society of Security Analysts and the Pennsylvania Bar Association. ■